ATTORNEY-GENERAL OF CEYLON v. AR. ARUNACHALAM CHETTIAR & ORS. (No. 1)

[J. C. (Viscount Simonds, Lord Reid, Lord Cohen, Lord Somervell of Harrow and the Rt. Hon. L. M. D. de Silva) July 10, 1957]

[Privy Council Appeal No. 16 of 1955]

Estate duty — Hindu undivided family — Mitakshara — Death of one of two surviving coparceners — Assets of family business — Coparcener has no "share" in family property — Interest not "property passing" on his death — Not property of which he was "competent to dispose" — Not interest "ceasing on his death" — Not liable to estate duty — Ceylon Estate Duty Ordinance, No. 8 of 1919, ss. 7, 8(1)(a) & (b).

In this case a father and son, who died on February 23, 1938, and July 9, 1934, respectively, were the only living coparceners of a Hindu joint family governed by the Mitakshara school of Hindu law, which had tradings and other interests in Ceylon, India and other countries. On the death of the son the appellant claimed that the son's "half share" of the assets of the business carried on by the family in Ceylon was subject to estate duty as being either "property passing on the death of the deceased" within the meaning of section 7 of the Ceylon Estate Duty Ordinance, 1919, or "property of which the deceased was at the time of his death competent to dispose" or in which he had an interest "ceasing on his death" to the extent to which a benefit accrued or arose by the cesser of such interest within section 8(1)(a) and (b), respectively, of the Ordinance. The Supreme Court of Ceylon held that estate duty was not payable. The Attorney-General appealed.

Held: (1) it was a misuse of language to say that a coparcener had a "half share" or any "share" of the family property; the essential nature of his interest was that whilst the family remained undivided he could not predicate that he had a certain definite share. Although a coparcener had rights, such as those of partition and alienation — which gave colour to the view that he had what might be called a "share" — as against that the karta (head of the family) had the duty, *inter alia*, to maintain out of the family property not only the coparceners but the female members of the family, and to provide for such family purposes as education, marriage and religious ceremonies. In such circumstances it could not be said that the son had a "share" of the property which "passed" on his death within section 7;

(2) although the son could at any time during his lifetime have obtained his share of the family property by partition, it would be little less than absurd to stretch "competency to dispose" in section 8(1)(a) to the extent of assuming that the son would take the necessary preliminary step of separating from his family — a step which for economic, sentimental and traditional reasons might be utterly repugnant to him. Further, if and in so far as "competency to dispose" rested upon a right to obtain partition, the family property included interests outside Ceylon, and it could not be assumed in favour of the appellant that, had there been a partition, any part of the property in Ceylon would have fallen to the share of the son. It could not be said, therefore, that the son was at or immediately before his death "competent to dispose" of the "half share" of the Ceylon property of the undivided family;

(3) for section 8(1)(b) to be applicable there must be not only a cesser of interest in property, but also a benefit arising by such cesser; and, further, the benefit, as provided by section 17(6) of the Ordinance, must be capable of valuation by reference to the income of the property which the deceased had enjoyed. Here, the son merely had a right to be maintained by the karta out of the common fund to an extent in the karta's absolute discretion, and there was no basis of valuation which in relation to such an "interest" would conform to the scheme prescribed by section 17(6). Nor, upon a cesser of that "interest" could a "benefit" of any value be said to have accrued to the surviving coparcener when the son's "interest" lapsed.

Accordingly, the claim to estate duty could not be upheld either under section 7 or section 8(1)(a) or (b).

Cases referred to :—

(1) *Appovier v. Rama Subba Aiyan* (1866) 11 Moo. I.A. 75, 89.

(2) *Katama Natchier v. Rajah of Shivagunga* (1864) 9 Moo. I.A. 539, 611.

(3) *In re Penrose* (1933) Ch. 793; 49 T.L.R. 285.

(4) *In re Parsons* (1943) Ch. 12; (1942) 2 All E.R. 496.

PRIVY COUNCIL APPEAL.

Appeal from a judgment and decree of the Supreme Court of Ceylon (October 12, 1953) affirming a judgment and order of the District Court of Colombo (November 8, 1949) whereby an assessment to estate duty under the provisions of the Estate Duty Ordinance, 1919, in respect of the estate in Ceylon of one Rm. Ar. Ar. Rm. Arunachalam Chettiar was set aside and the amount of estate duty paid ordered to be refunded.

This appeal was heard together with appeal No. 17 of 1955, reported immediately hereafter.

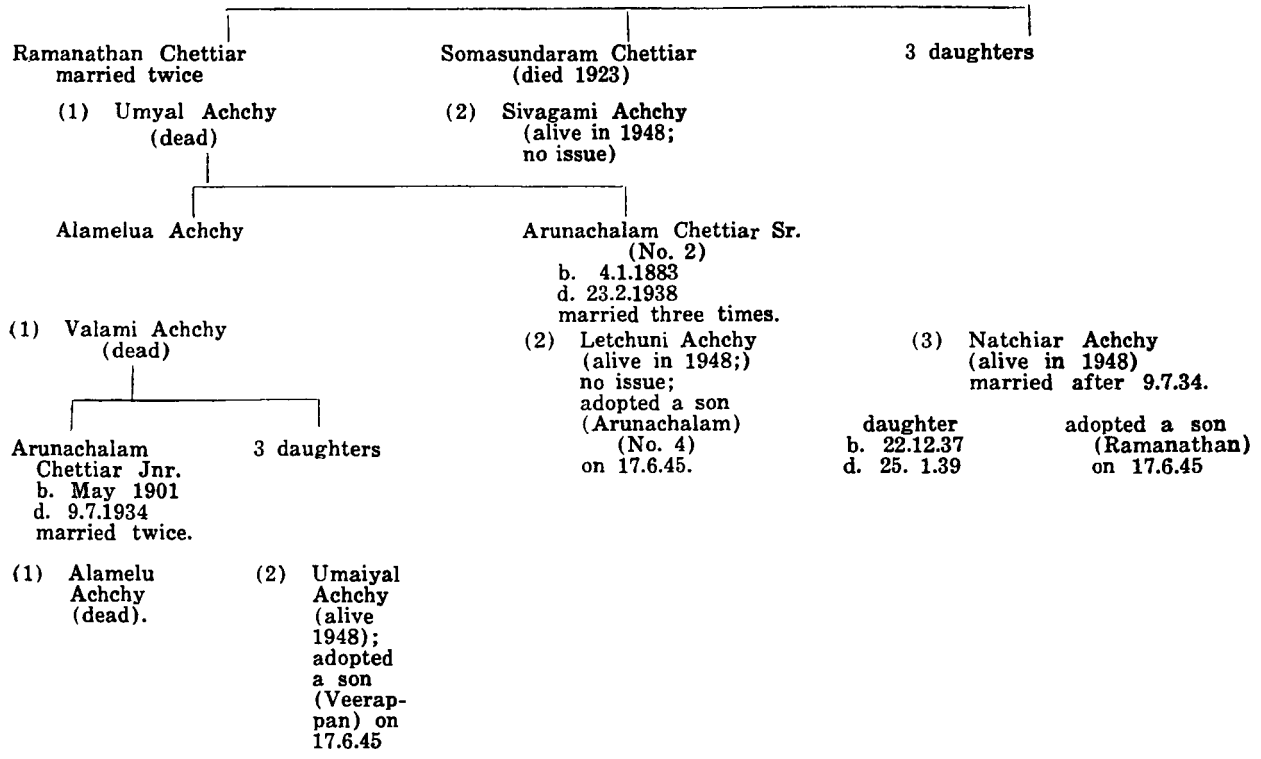
The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This appeal and the succeeding appeal, No. 17 of 1955, from the same Court, have certain facts in common which will be stated now and will not be repeated in the second appeal.

Both appeals raised questions as to the exigibility of estate duty under the relevant Ordinances of Ceylon upon the death, first, of one Rm. Ar. Ar. Rm. Arunachalam Chettiar, and second, of his father, one Rm. Ar. Ar. Arunachalam Chettiar. These gentlemen will be called "the son" and "the father."

The father and the son were members of a Hindu community known as Nattukottai Chettiars who inhabit certain districts of Southern India and were governed by the Mitakshara system of Hindu law in matters relating to inheritance, succession, adoption, marriage and other matters. They were also coparcenary members of a joint Hindu family which had extensive trading and other interests in India, Ceylon, and other far Eastern countries. Immediately before July 9, 1934, when the son died, he and the father were the only living coparceners. The father then became the sole surviving coparcener of the family. But there were females also who, though they had not the rights of coparceners, yet had rights of residence in, and maintenance out of, the joint family property and were in all respects members of the Hindu undivided family of which the father and son were coparceners. Moreover, it was competent for the surviving widow of the son to adopt a son who would thus become a coparcener with the father, and the father himself during his life and after his death his surviving widows had a similar power of adoption. The genealogical tree overleaf shows not only the members of the family but the manner in which those powers of adoption were exercised.

The son, as has been said, died on July 9, 1934. The father died on February 23, 1938. Both of them died in India where they were domiciled.

ARUNACHALAM CHETTIAR (No. 1).



On October 31, 1938, the Assessor of Estate Duty, Colombo, served on the administrators of the estate of the father a notice of assessment that in respect of the estate of the son estate duty payable by them had been assessed at a figure of Rs. 223,493.70. This sum was by amended notices reduced to Rs. 221,743. From the notices it was clear that the assessment was in respect of what was described as the "deceased's half share" of the assets of the business carried on by the family in Ceylon and of certain other assets. Objection was duly taken to the assessment but was overruled by the Commissioner of Estate Duty. The matter was then appealed to the District Court of Colombo. The District Judge allowed the appeal, and an appeal from his decision by the present appellant, the Attorney-General of Ceylon, to the Supreme Court of Ceylon (Gratiaen and Gunasekara JJ.) was dismissed.

At the date of the son's death estate duty was imposed by the Estate Duty Ordinance, No. 8 of 1919, which in all material respects was a faithful copy of the Finance Act, 1894, of the United Kingdom. The following are the provisions of the Ordinance which are relevant to this appeal:

"THE ESTATE DUTY ORDINANCE NO. 8 OF 1919.

"2. — (1) In this Ordinance, unless the context otherwise requires, the term —

'Estate duty' means the duty imposed under the provisions of this Ordinance in case of the death of any person dying on or after the commencement* of this Ordinance.

'Deceased' means any person dying on or after the commencement of this Ordinance . . . .

'Property' includes movable and immovable property of any kind situate or being in the Colony and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale . . . .

'Property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and the expression 'on the death' includes 'at a time ascertainable only by reference to the death.'

(2) For the purposes of this Ordinance — (a) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself . . . .

7. In the case of every person dying after the commencement of this Ordinance, there shall, save as hereinafter expressly provided, be levied and paid, upon the value of all property settled or not settled, which passes on the death of such person, a duty called 'estate duty,' at the graduated rates set forth in the schedule to this Ordinance.

8. — (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— (a) Property of which the deceased was at the time of his death competent to dispose. (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest . . . .

17. — (6) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall — (a) If the interest extended to the whole income of the property, be the value of that property; and (b) If the interest extended to less than the whole income of the property, be such proportion of the value of the property as corresponds to the proportion of the income which passes on the cesser of the interest."

Sir Frank Soskice Q.C., John Senter Q.C., R. K. Handoo and *Jenny Bisschop* for the appellant.

* July 1, 1919.

D. N. Pritt Q.C., Ralph Millner, J. D. Derrett and *Sirimevan Amerasinghe* for the respondents.

The judgment of their Lordships was delivered by :—

Viscount Simonds (who stated the facts set out above and continued): — It was and is claimed by the appellant that estate duty in respect of the son's estate was exigible either under section 7 of the Ordinance (which corresponds with section 1 of the Finance Act, 1894) or under section 8(1) (a) or (b) (which reproduce part of section 2 of the same Act).

It became necessary, therefore, to determine with as much precision as the subject-matter permitted, what was the nature of the son's interest in the property in Ceylon of the Hindu undivided family of which he and the father were coparceners. This was a question of fact for the Courts of Ceylon and is today a question of fact for their Lordships also, notwithstanding that frequent reference was made to decisions of this Board given at a time Hindu law was within their cognizance.

Expert evidence was accordingly called and given at great length by distinguished Hindu lawyers, who, though they necessarily agreed generally upon the material principles of the Mitakshara law, took different views upon certain aspects of that law. And it was upon those differences that counsel for the appellant based his argument, relying upon the evidence given by the Advocate-General for Madras before the District Judge. It was not seriously urged that this was a case in which their Lordships should regard the matter as concluded by the fact that there were concurrent findings by the District Judge and the Supreme Court as to the nature in Hindu law of the son's interest. They have therefore felt at liberty, and indeed bound, to scrutinize the evidence given by the witnesses together with the authoritative text books and the case law upon which they relied. Nor did they reject references in the present appeal to authorities which had not been referred to in evidence. But, having done so, they must express the opinion, which as the case proceeded more and more forced itself upon them, that the issue turned not upon the minor differences between the expert lawyers but upon the possibility, whichever of them was right, of bringing within the scope of a taxing Act couched in the language of the 1919 Ordinance an interest which originated in a wholly different system of law. The language of the Finance Act may be appropriate to the law of Ceylon, but it is singularly inappropriate to the legal concepts upon which the Hindu undivided family is based, and their Lordships would at the outset insist as a first principle of taxing law that its language is not to be strained to an unnatural use in order to enlarge its scope. This is particularly to be observed where the matter which is the subject of claim is well known and susceptible of clear definition and taxation by appropriate words.

It is in this context that the questions must be asked whether any property passed upon the death of the son within the meaning of section 7 of the Ordinance or whether, alternatively, he was "competent to dispose" of any property at the time of his death within section 8(1) (a), or whether there was any property in which he had an interest ceasing on his death within section 8(1) (b), an interest which falls to be measured by the extent to which a benefit accrues or arises by its cesser, which benefit is in its turn valued in accordance with the provisions of section 17(6) of the Ordinance.

First, then, did any and what property "pass" on the death of the son? An attempt was made at the hearing before their Lordships to argue that the whole of the property in Ceylon of the Hindu undivided family so "passed," though a claim for estate duty in respect of one half only was made. Their Lordships considered this argument to be inadmissible in view of the assessment that had been made and the course that the proceedings had so far taken. Counsel was therefore limited to the argument that the son's share in that property "passed" and that that share was one-half.

It appears to their Lordships that this contention is refuted by the most elementary consideration of the Mitakshara law. The District Judge observed that "to describe the deceased as a coparcener in relation to the joint property is but to adopt a convenient term in the process of attempting to analyse a legal concept which has no precise equivalent in this country." And he added, "the problem before us cannot satisfactorily be solved by the mere selection of appropriate words." But whatever else may be said of a coparcener, it is clear that it would be a misuse of language to say that he had a "half share" or any "share" of the family property. The numerous passages to which their Lordships were referred in *Mulla's* Principles of Hindu Law and *Mayne's* Hindu Law and Usage illustrate and expand the statement made by Lord Westbury in delivering the opinion of this Board in *Appovier v. Rama Subba Aiyan*[1]: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share." A little earlier in *Katama Natchier v. Rajah of Shivagunga*[2] Turner L.J. had referred to the property as "the common property of a united family." "There is," he said, "community of interest and unity of possession between all the ('coparceners'), members of the family, and upon the death of any one

of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."

These two passages, capable as they may be of qualification and refinement, state the essential nature of a coparcener's interest. It is true that he has other rights which appear to enlarge that interest. He can separate from the family and ask for partition of the family property: he can in certain circumstances alienate his interest (a later and not universal development of the Mitakshara law) and, if he does so, the Court will, if necessary, protect the alienee's right by decreeing the partition for which he might himself have asked. So also the Court may intervene for the benefit of an execution creditor. These incidents give colour to the view that a coparcener has what may be called a "share." But against them may be set the fact that the disposition of the income of the family property is in the discretion of the Karta, usually the senior male member of the family, whose right and duty it is to maintain out of it not only the coparceners but also the female members of the family, the wives, widows and unmarried daughters of living or dead coparceners, and further to devote such money as may be necessary for such family purposes as the education, marriage, and religious ceremonies of the coparceners and of the members of their respective families (see *Mulla*, section 237). To say that in such circumstances a coparcener has a "share" of the property which "passes" on his death is in their Lordships' opinion a clear misuse of language. Nor does it help to say that the property is "vested" in or "owned" by (if "vest" and "own" are legitimate words to use) the coparceners for the time being rather than by all the members of the undivided family. It appears to their Lordships unnecessary to examine further this aspect of the claim, and the less so because they do not dissent from the views expressed by the District Judge and Gratiaen J. in their careful and exhaustive judgments.

Section 7 failing him, the appellant turns to section 8(1)(a) and contends that the son was at or immediately before his death "competent to dispose" of a share — again a half-share — of the Ceylon property of the undivided family: therefore the property passing on his death must be deemed to include that half share.

This contention was based primarily on the consideration that the son could at any time during his lifetime have obtained his share of the family property by partition. Having first communicated his intention to separate from the family, he could then have obtained his share either by agreement or in the absence of agreement by going to the Court and getting a decree. It was a complementary contention that he could by alienating or purporting to alienate his "share" for value place his alienee in a position in which the Court would decree in favour of the latter the same partition that it would have granted to him. Thus indirectly at one or two removes, it was said, one half of the Ceylon property could have been disposed of by the son in his lifetime. In support of his argument reference was made to English cases, such as *In re Penrose*[3] and *In re Parsons*[4]. The correctness of these decisions is not in issue, but it seems to their Lordships that they throw no light upon the question, though the argument illustrates the danger of trying to apply the principles of English law to the esoteric doctrines of the Hindu undivided family. There are other answers to the contention, but, leaving them aside for the moment, why should it be assumed that the son would take the necessary preliminary step of separating from his family, a step which for economic, sentimental and traditional reasons might be utterly repugnant to him? It would be little less than absurd to stretch "competency to dispose" to such an extremity. Moreover, if, and so far as "competency to dispose" rests upon a right to obtain partition, it must be remembered that both son and father were domiciled in India and that the family property included interests not only in Ceylon but in India and other parts of Asia. Their Lordships have no right to assume in favour of the appellant that, if there had been a partition by agreement or decree, any part of the property in Ceylon would have fallen to the share of the son. Counsel for the appellant tried to meet this difficulty by saying that, if there was a partition, at least the Ceylon property would have fallen to someone's share, but this did not appear to their Lordships to be equivalent to saying that the son had been competent to dispose of it. The same considerations apply to the contention that the son was competent to dispose of one half of the Ceylon property because he might have alienated for value and his alienee might have applied to the Court (to use a phrase sometimes used in this connexion) "to work out the equities" in his favour. Such a process leaves the son at a long distance from competency to dispose of any particular part of the family property.

Finally section 8(1)(b) of the Ordinance was invoked. Duty is exigible under this sub-section in respect of property (a) in which the son had an interest ceasing on his death, (b) to the extent to which a benefit accrues or arises by the cesser of such interest, the value of that benefit being measured in accordance with the provisions of section 17(6) of the Ordinance, that is to say, if the interest extended to the whole income of that property, being the value of that property or, if it extended to less than the

whole income of the property, being the corresponding proportion of the value of the property.

It is clear then that two elements must coincide. There must be not only a cesser of interest in property: there must be also a benefit arising by such cesser. And further, the benefit must be capable of valuation by reference to the income of the property which the deceased had enjoyed. The brief exposition already given of the law of the Hindu undivided family is sufficient to show how inept is the language of the Ordinance to embrace the case of the death of a coparcener. Their Lordships are so fully in agreement with what was said by Gratiaen J. in the Supreme Court that they quote and adopt his words: "He (the deceased) merely had a right to be maintained by the karta out of the common fund to an extent which was at the karta's absolute discretion; in addition he could, if excluded entirely from the benefits of joint enjoyment, have taken appropriate proceedings against the karta to ensure a recognition of his future maintenance rights and also to obtain compensation for his earlier exclusion. I find it impossible to conceive of a basis of valuation which, in relation to such an 'interest,' would conform to the scheme prescribed by section 17(6). Nor do I think that, upon a cesser of that so-called 'interest,' a 'benefit' of any value can be said to have accrued to the surviving 'coparcener' when the deceased's 'interest' lapsed." This reasoning appears to their Lordships to be cogent and conclusive. Counsel for the appellant sought a way of escape by urging that at least the surviving coparcener must benefit by the fact that the deceased could no longer claim partition of the family estate. That might or might not be an advantage to him, but the short answer is that it is not a benefit susceptible of valuation in the only way which the Ordinance prescribes.

In the result the claim to duty cannot be upheld either under section 7 or section 8(1)(a) or (b). Subsidiary questions were raised with which it is not necessary to deal. If their Lordships had taken a different view on the main question, it would have been necessary to consider the local situation of certain so-called Mysore bonds. It need not now be discussed. Nor is it necessary to consider whether, as was urged by the respondents, they were not liable to pay the duty upon the son's death, even if it was otherwise exigible. Upon this question their Lordships express no opinion. Finally, a submission was made in regard to immovable property in Ceylon, in which reliance was placed on section 18 of the Partition Ordinance, No. 10 of 1863 and section 7 of the Wills Ordinance, No. 21 of 1844. This matter does not appear to have been raised in the Court of the District Judge. In the Supreme Court it was dealt with summarily by Gratiaen J., and their Lordships concur in the view that he expressed.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.; Lee & Pembertons.*

ATTORNEY-GENERAL OF CEYLON v. AR. ARUNACHALAM CHETTIAR & ORS. (No. 2)

[J. C. (Viscount Simonds, Lord Reid, Lord Cohen, Lord Somervell of Harrow and the Rt. Hon. L. M. D. de Silva) July 10, 1957]

[Privy Council Appeal No. 17 of 1955]

Estate duty — Hindu undivided family — Mitakshara — Death of sole surviving coparcener — Subsequent adoption by widow — Continuity of family preserved — Property in coparcener's hands "joint property of" the family — Statutory exemption from estate duty — Ceylon Estate Duty Ordinance, No. 1 of 1938, s. 73.

In this case, the father, the sole surviving coparcener of a Hindu undivided family, to which also a number of females belonged, died in 1938 shortly after the Ceylon Estate Duty Ordinance, 1938, came into operation, which, by section 73, then provided that "where a member of a Hindu undivided family dies, no estate duty shall be payable on any property proved to the satisfaction of the commissioner to be the joint property of that Hindu undivided family." No other coparcener (after the death of his son in 1934) had come into existence during the father's lifetime, but powers of adoption in his deceased son's widow and in his own widows were, in fact, exercised after his death. At all material times the female members of the family had the right of maintenance and other rights which belonged to them as such members. The appellant claimed estate duty in respect of the father's estate in Ceylon. The Supreme Court of Ceylon held that estate duty was not payable.

Held: (1) the father was at his death a member of a Hindu undivided family, the same undivided family of which his son, when alive, was a member, and of which the continuity was preserved after the father's death by the adoptions;

(2) it was only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it could be determined whether the family property could properly be described as "joint property" of the undivided family. While it might be correct to describe the sole surviving coparcener as the "owner" of the family property, that which he "owned" was joint family property. His ownership was such that on the adoption of a son it assumed a different quality; it was such, too, that female members of the family had a right to maintenance out of it. The extent to which he could alienate it was an irrelevant consideration, for if he did not alienate it, it remained joint family property. Accordingly, while the undivided family persisted, the property in the hands of a single coparcener could properly be described as the "joint property" of that family, and was therefore exempt from estate duty under section 73 of the Ordinance of 1938.